IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33433

MISTY BLESSING, individually and as administrator of THE ESTATE OF WALLIE BLESSING,

APPELLANT

v.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS and BYRON SMITH

APPELLEES.

APPELLEES' BRIEF

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I. Introduction

Appellees West Virginia Department of Transportation, Division of Highways and Byron Smith (collectively "Department") hereby respond to the Appellant's Brief filed by Misty Blessing, individually and as the administrator of the estate of Wallie Blessing ("Appellant"), seeking reversal of Judge Irene Berger's award of summary judgment to the Department. Judge Berger ruled that no genuine issue of fact exists that could result in coverage under the State of West Virginia's liability insurance policy, and therefore sovereign immunity bars the claims against the Department. Judge Berger also ruled that a contractual indemnity provision is not the "State's liability insurance coverage" within the meaning of *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172, W. Va. 743, 310 S.E.2d 675 (1983).

This case sets forth a perfect example of how the State's insurance coverage works and why it does not (and should not) afford coverage under the circumstances at issue in this case. This is not a case where sovereign immunity produces an unjust result by denying compensation to party wrongfully injured by an action of the State. By contrast, the party whose fault lead to the Appellant's injury ultimately provided compensation to Appellant to resolve the claims against it. This Court should affirm Judge Berger's summary judgment order because the facts, the law, the policy behind sovereign immunity and the holding of *Pittsburgh Elevator* all support the ruling below. First, the Department did not have the burden of presenting affirmative evidence to obtain summary judgment (Appellant's first assignment of error) because Appellant failed to establish any evidence to satisfy an essential element of her claim - the existence of insurance coverage to negate sovereign immunity. Second, no genuine issue of material fact existed as to whether Department employees were "performing construction" at the scene of the accident within the meaning of the Department's insurance policy that would create coverage

(Appellant's second assignment of error). There is absolutely no evidence that employees of the Department were in any way involved in the events leading up to the accident that resulted in the death of Appellant's decedent. Third, neither a contractual indemnity agreement nor insurance purchased by a third party qualify as "the State's liability insurance coverage" within the meaning of *Pittsburgh Elevator* (Appellant's third assignment of error). Lastly, Judge Berger properly followed the mandates of the West Virginia Constitution and this Court's well-established precedent by applying the principle of sovereign immunity (Appellant's fourth assignment of error).

II. Points and Authorities Relied Upon

Cases

Statutes

Rules

Constitutional Provisions

III. Factual Background

The underlying facts of this matter are largely undisputed. Appellant's decedent, Wallie Blessing, worked as an employee for National Engineering & Contracting Company ("NECC") at a construction site known as the Man/Rita Bridge in Logan County, West Virginia. NECC, also named as a defendant in the action below, had been awarded a contract by the Department to build the Man/Rita Bridge. An employee of the Department and Appellant herein, Byron Smith, also worked at the Man/Rita Bridge site as a Project Supervisor. In this capacity, Mr. Smith was responsible for various administrative duties and was in charge of a team of Department inspectors who ensured that the project proceeded according to the contract specifications. In common parlance, the Project Supervisor is best described as the Department's chief inspector for the project.

On or about October 3, 2003, the plaintiff's decedent Wallie Blessing, was working atop a section of "tremie" scaffolding during a concrete pour operation. A "tremie" scaffold is a circular platform used in the construction of large concrete pillars. The platform and supporting scaffold surround a pillar form and enable a worker on the platform to direct the placement of wet concrete from a crane bucket into the pillar form. As the form is filled, the platform is intermittently raised to allow the worker to direct additional wet concrete into the form. At the conclusion of one of the pillar pours, the scaffold collapsed as the ground crew prepared to lower the platform and Mr. Blessing sustained fatal injuries from the fall.

Subsequent investigations by co-defendant Balfour Beatty Construction, Inc.,[1] ("Balfour Beatty") and the Occupational Safety and Health Administration ("OSHA") determined that the cause of the scaffold collapse was the premature loosening of two bolts by a NECC employee working on the ground crew in preparation to lower the scaffold. Prior to loosening the two bolts, the employee failed to ensure that the scaffold apparatus was otherwise secure.

The contract between the Department and NECC, which set forth all the specifications and requirements for the project, contained a "hold harmless" provision in favor of the Department that appears in pertinent part as follows: "Contractor [NECC] agrees . . . to save the Department harmless from all liability for damage to persons or property that may accrue during and by reason of the acts or negligence of the Contractor [NECC], his agents, employees, or subcontractors if there be such." Similar indemnification language also appears in the "Contractor's Proposal" that is incorporated into the final contract.

At the time of the accident, the Department had in effect a liability insurance policy issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, which provides coverage for certain acts of negligence. Endorsement 7 of this policy contains the relevant policy language for this matter:

> It is agreed that this insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences, or related or similar activities or things but it is agreed that the insurance afforded under this policy does apply (1) to claims of "bodily injury" or "property damage" **which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the "bodily injury" or "property damage" occurred performing construction, maintenance, repair, or cleaning (but**

[1] Balfour Beatty is the parent company of NECC.

> **excluding inspection of work being performed or materials being used by others)** and (2) to claims of "bodily injury" or "property damage" which arise out of the maintenance or use of sidewalks which abut buildings covered by this policy. (emphasis added)

In short, the Department's policy only provides insurance coverage for "bodily injury" or "property damage" arising out of the Department's "ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use, or control of . . . bridges" when employees of the Department are physically present at the site of the incident "performing construction, maintenance, repair, or cleaning." Activities described as "construction, maintenance, repair, or cleaning" specifically exclude inspection of work being performed or materials being used by others. If Department employees are not present at the site of the incident performing such activities, no insurance coverage exists and sovereign immunity applies. The scope of coverage delineated by Endorsement 7 has remained unchanged since 1994. The Department was not a named insured under any other insurance policy and Appellant does not claim otherwise.

In September of 2004, Appellant filed a Complaint asserting various claims arising from Mr. Blessing's accident against the Department, NECC, Balfour Beatty Construction, Mr. Smith, and several other defendants involved in the bridge construction. Appellant's Complaint, as amended, asserted five counts against the various Defendants. Of the five counts, only three named the Department as a Defendant. Count III asserted a simple negligence claim against the Department and others alleging they "negligently encouraged or failed to discourage the use of an unsafe 'tremie' scaffold for the purposes of concrete placement at the Man/Rita Bridge, which scaffold violated multiple provisions of federal regulations and accepted standards of the industry." (Am. Compl. at ¶ 38). Count IV asserted that Byron Smith and others "acting in their capacity as registered professional engineers when decisions were made about the method for

pouring the concrete . . . had a professional duty to require that a safe method for concrete placement be implemented." (Id. at ¶ 41). Count V asserted a claim for premises liability/negligence against the Department claiming that the Department, "[a]s the property owner . . . has a duty to provide plaintiff's decedent with a safe place to work and warrant that the job site was safe." (Id. at ¶ 45). In sum, of the five counts, only Counts III, IV, and V named the Department as a Defendant.[2]

IV. Basis for Summary Judgment Below

In October of 2004, the Department moved to dismiss the Complaint for lack of subject matter jurisdiction based on the absence of any insurance coverage for the claims asserted against the Department. In June of 2005, Judge Berger denied the motion without prejudice and granted Appellant leave to conduct discovery against the Department solely on the issue of whether facts exist that could result in insurance coverage under the Department's policy. After discovery on this issue concluded, the Department moved for, and Judge Berger granted, summary judgment on the claims against the Department because Appellant failed to demonstrate the existence of any genuine issue of material fact that could result in insurance coverage under the Department's policy. Specifically, Judge Berger concluded:

> The record of this matter contains no evidence that any employee of the State of West Virginia was physically present at the site of Wallie Blessing's accident "performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others) . . . ." Mr. Smith's conduct as the Project Supervisor does not amount to performance of "construction, maintenance, repair, or cleaning."

Summary Judgment Order at 6 (September 13, 2006).

[2] Court I asserted a strict liability claim against NECC, who allegedly designed the scaffold where Mr. Blessing was working. Count II asserted a "deliberate intent" claim against both NECC and Balfour Beatty Construction.

In the absence of insurance coverage under the Department's policy, sovereign immunity bars Appellant's claims against the Department. Judge Berger also ruled that "the hold harmless provision set forth in the contract between the Department and NECC is not the State's liability insurance within the meaning of *Pittsburgh Elevator* . . . ." *Id.*

Appellant subsequently settled her claims against the other defendants for approximately $610,000.00 and also received a Worker's Compensation award for the death of Mr. Blessing.

V. Sovereign Immunity and the State's Liability Insurance Policy

It is well-settled law that the State of West Virginia enjoys constitutional immunity from civil suits except to the extent that the Legislature consents to such suits or insurance coverage is available under "the State's liability insurance coverage." Syl. Pt. 2, *Pittsburgh Elevator*, 172 W. Va. 743, 310 S.E.2d 675. "[T]he State's liability insurance coverage" at issue in *Pittsburgh Elevator* and its progeny is the insurance policy procured by the State as authorized by the Legislature in West Virginia Code § 29-12-5. The existence of insurance coverage under this policy, or the lack thereof, is ultimately determinative of whether the circuit court has jurisdiction over a case. In the absence of insurance coverage, the circuit courts lack subject matter jurisdiction over claims against the State and its agencies. *See Arnold Agency v. West Virginia Lottery Com'n*, 206 W. Va. 583, 590, 526 S.E.2d 814, 821 (1999).

One of the reasons *Pittsburgh Elevator* held that constitutional immunity does not bar suits seeking recovery under "the State's liability insurance coverage" is that the statute authorizing the State to obtain liability insurance specifically prohibits any insurer who issues such a policy from relying on constitutional immunity in response to claims made against the policy. "In light of this statutory prohibition, we conclude that a suit seeking recovery against

the State's insurance carrier is outside the bounds of the constitutional bar to suit contained in W.Va. Const. art. VI, § 35." *Id.* at 688. This statute further authorizes the State, through the Board of Risk and Insurance Management ("BRIM"), to bargain with insurers and determine the scope and amount of coverage provided by the policy. The statute specifically provides that the State is "not required to provide insurance for every state property, activity or responsibility." W. Va. Code § 29-12-5(a)(3). More specifically, BRIM is authorized to obtain "reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities." W. Va. Code § 29-12-5(a)(2). This Court has recognized that BRIM enjoys wide discretion in fixing the scope of insurance coverage:

> We note that the Legislature may direct such limitation or expansion of the insurance coverages and exceptions applicable to cases brought under W.Va. Code § 29-12-5, as, in its wisdom, may be appropriate. The Legislature has also vested in the State Board of Insurance (Risk and Insurance Management) considerable latitude to fix the scope of coverage and contractual exceptions to that coverage by regulation or by negotiation of the terms of particular applicable insurance policies.

Parkulo v. West Virginia Bd. of Probation and Parole, 199 W. Va. 161, 175-76, 483 S.E.2d 507, 521 - 22 (1996).

The National Union insurance policy described above represents the State's effort to obtain "reasonably broad protection against loss, damage or liability to state property and on account of state activities and responsibilities" with regard to activities by the Department. The scope of coverage under the policy reflects a common sense approach, based on sound public policy, to determining when the Department may fairly be held responsible for an injury involving State roads.

The role of the Department in the maintenance of our State roads, and its relationship to the contractors who build them, provides a rational basis for why insurance coverage is generally available only when employees of the Department are physically present at the site of an incident

"performing construction, maintenance, repair, or cleaning," which excludes inspection of the work and materials being performed by others. The Department does not have the manpower, equipment, or the expertise to construct modern bridges and roads. What the Department does have is the manpower, equipment, and expertise to maintain those bridges and roads once they are built. Consequently, the Department, pursuant to a very specific statutory scheme, solicits bids from qualified contractors to build bridges and roads and the Department then maintains those bridges and roads. Since the Department, through the use of its own employees and equipment, does not build bridges and roads but only maintains them, the Department's bargained for insurance contract naturally provides coverage only for losses that occur while Department employees are actually performing the work which could possibly have resulted in an injury. In other words, coverage is available when Department employees may possibly be responsible for an injury by virtue of their presence at the scene and the work they are performing. When new roads and bridges are built, Department employees are not actually performing any of the work attendant to the construction, but rather they are only inspecting the project to ensure that the contractor uses the correct materials and proceeds according to the contract specifications. The contractor who has been awarded the contract is, simply by virtue of having been deemed the "lowest responsible bidder," mandated to have in place adequate insurance coverage sufficient to cover any injuries attributable to work performed by the contractor's employees. The construction contracts also have hold harmless provisions to enable the Department to recover any expenses incurred in defending suits, such as this one, brought against the Department arising out of an accident on a construction project involving a contractor's employees.

By contrast, when the Department is performing maintenance activities on roads and bridges, Department employees are present performing the work. If an accident occurs during such maintenance activity, it is reasonably possible that Department employees or equipment may be responsible and therefore insurance coverage is available in such circumstances if liability is demonstrated. This eliminates the injustice recognized by *Pittsburgh Elevator* where our constitution, by virtue of sovereign immunity, "would not protect the life and limbs of a person negligently run down by a truck driven by an employee of the State Road Commission . . . ." *Pittsburgh Elevator*, 172 W. Va. at 754, 310 S.E.2d at 686.

VI. Standard of Review

A lower court's order awarding summary judgment will be reviewed *de novo* on appeal. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Rule 56(c) of the West Virginia Rules of Civil Procedure provides that summary judgment is appropriate when "there is no issue as to any material fact" or if the case "only involves a question of law." *Miller v. City Hosp., Inc.*, 197 W. Va. 403, 407, 475 S.E.2d 495, 499 (1996). Summary judgment is proper where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 4, *Painter*, 192 W. Va. 189, 451 S.E.2d 755.

VII. Summary Judgment Was Appropriate

Appellant asserts four assignments of error with regard to Judge Berger's order awarding summary judgment to the Department:

1) the Department's motion for summary judgment did not include evidence and was insufficient to shift any burden to Plaintiff to demonstrate the existence of a genuine issue of material fact under Rule 56(c);

2) a question of fact existed as to whether Department employees were engaged in construction activities at the site of Mr. Blessing's accident rather than inspection activities;

3) a contractual indemnity agreement in the Department's favor or a third party's insurance policy qualify as the "State's liability insurance coverage" within the meaning of *Pittsburgh Elevator*; and

4) Judge Berger should have ignored the constitutional principle of sovereign immunity and unilaterally overruled well-established precedent set forth in *Pittsburgh Elevator* and its progeny.

None of these four assignments of error can withstand scrutiny.

A. The Department Does Not Bear the Burden of Presenting Evidence to Obtain Summary Judgment

Contrary to the Appellant's position, the Department did not bear the burden of presenting evidence to obtain summary judgment. Appellant, as the plaintiff below, bore the burden of coming forth with affirmative evidence to at least create a genuine issue of material fact on all essential elements of her claims. It is black-letter law that where the nonmoving party fails to make a sufficient showing on an essential element of its claim, summary judgment is appropriate. Syl. Pt. 4, *Painter*, 192 W. Va. 189, 451 S.E.2d 755. For claims against the Department, an agency of the State of West Virginia, an essential element for any Plaintiff is to establish facts to overcome the presumption of sovereign immunity. In this case, an essential element of Appellant's claims against the Department is the existence of insurance coverage

because, without such coverage, the circuit court below lacked jurisdiction to adjudicate the claim. *See Arnold Agency*, 206 W. Va. at 590, 526 S.E.2d at 821. As the plaintiff below, Appellant bore the burden of demonstrating facts that at least create a genuine issue of material fact as to whether insurance coverage existed. The parties do not dispute that the only way insurance coverage could have existed for Appellant's claim is if Department employees were physically present at the scene of the accident "performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others)." Appellant is simply wrong in claiming that the Department must disprove the existence of insurance coverage by affirmative evidence to obtain summary judgment - i.e. that there were "no State employee(s) present at the site of the incident; and, the employee(s) were not performing construction work (other than inspection of work by others)." *Appellant's Brief* at 11-12. The existence of insurance coverage is not a rebuttable presumption that the Department must overcome. Rather, establishing insurance coverage to overcome sovereign immunity is an essential element of Appellant's claim against the Department and she bore the burden of establishing evidence to satisfy this element. As discussed below, even after the circuit court granted leave to conduct discovery on this issue, Appellant failed to develop any evidence that at least created a genuine issue of material fact on the issue of coverage. Therefore, summary judgment was appropriate.

B. No Genuine Issue of Material Fact Exists That Could Result In Coverage under the Department's Insurance Policy

The primary basis for Judge Berger's award of summary judgment was the absence of any genuine issue of material fact that could have resulted in coverage under the Department's insurance policy. Judge Berger granted leave to Appellant to conduct discovery for facts that

would establish insurance coverage. After conducting this discovery, Appellant failed to identify any evidence that created a genuine issue of material fact regarding whether coverage existed under the State's insurance policy. As discussed above, the failure to establish this essential element of her claim entitled the Department to summary judgment.

None of the evidence Appellant cites in her brief even comes close to establishing facts that may support the existence of coverage under the Department's policy. The only Department employee that Appellant claims was "performing construction" at the scene of the accident is Mr. Smith, the Project Supervisor. While Appellant cites to deposition testimony by co-respondent Mr. Smith and also by another Department inspector, Jack Hardin, in support of her arguments, actual excerpts from these deposition transcripts are notably absent. *See Appellant's Brief* at 12-13. All that appears is Appellant's interpretation of testimony given by Mr. Smith. Below are the activities of Mr. Smith that Appellant's claim constitute "performing construction" as defined by the insurance policy:

- having the job title "Project Supervisor"
- presence on the job site
- right to intervene in work performed by contractors
- ability to instruct NECC on construction methods
- approving progress payments

Appellant's Brief at 13. None of these activities even suggest that Mr. Smith was engaged in anything other than inspection activities at the construction site. By contrast, these activities are indicative of Mr. Smith's role as chief inspector at the site to inspect the work and materials being used by the hired contractors and to ensure that the project was proceeding in accordance with the contract specifications.

The Department employees assigned to the Man/Rita bridge project, including Mr. Smith, were inspectors and were present at the scene of the construction on a daily basis to inspect the materials used by the contractor and to monitor the progress of the work. This inspection activity is specifically excluded from the type of conduct that creates insurance coverage under the Department's insurance policy - and rightly so. Inspection activity does not involve the type of conduct that can fairly attribute fault to the Department in the event of an accident.

Appellant's reliance on the interrogatory response by H.C. Nutting Company adds nothing to bolster her argument for insurance coverage. *See Appellant's Brief* at 13. The Department's establishment of criteria for testing and inspection of materials does not amount to construction activities - that is how the Department ensures that its contractors adhere to the project specifications. The insurance policy specifically excludes inspection activities by Department employees from the type of actions that give rise to insurance coverage. Appellant's argument to narrowly construe the term "inspection" and broadly construe the term "construction" would effectively excise the policy language excluding inspection activities from actions that give rise to coverage. This is contrary to the most basic cannon of construction that "[f]orce and effect must be given to every word, phrase and clause employed, if possible" in a contract. *Henderson Development Co. v. United Fuel Gas Co.*, 121 W. Va. 284, 3 S.E.2d 217, 219 (1939). Moreover, Appellant's argument is the epitome of the exception swallowing the rule. If inspection activities are the same as "performing construction" then the exclusion for inspection activities is meaningless.

Judge Berger was correct in concluding that Mr. Smith's conduct at the job site constituted inspection activities that are specifically excluded from the type of conduct that gives rise to coverage under the Department's insurance policy.

This case presents a perfect example of how the Department's insurance coverage and contractual relationships with its contractors are supposed to work in the event of an injury at a construction site involving a contractor's actions. As mentioned above, the Department retains contractors to perform highway construction projects for a reason: the Department does not have the manpower, equipment, or expertise to perform such projects. The Department's only role on such a project is to inspect the materials used and the work performed to ensure that the contractor follows the contract specifications. To accomplish this goal, the Department has inspectors at the job site. NECC, the contractor who was awarded the contract to build the Man/Rita Bridge, had insurance coverage to cover incidents such as Mr. Blessing's accident. More importantly, NECC was engaged in activities that fairly make it responsible for such accidents. As mentioned above, an NECC employee caused the accident by prematurely loosening two bolts in preparation to lower the scaffold. Consequently, NECC ultimately entered into a settlement agreement with the Appellant. The Department was properly awarded summary judgment because Appellant failed to identify a scintilla of evidence that suggests that the Department employees present at the Man/Rita Bridge construction site were performing anything other than inspection activities at the time of Mr. Blessing's unfortunate accident. In other words, no insurance coverage was available because no Department employees were present at the scene of Mr. Blessing's accident "performing construction, maintenance, repair, or cleaning."

C. An Indemnity Agreement or Third Party Insurance Is Not "the "State's Liability Insurance Coverage" Within the Meaning of *Pittsburgh Elevator*

Appellant argues that a contractual hold harmless provision favoring the Department or a third-party's potential insurance coverage qualify as "the State's liability insurance coverage" within the meaning of *Pittsburgh Elevator*. These arguments are untenable.

1. A Hold Harmless Agreement Is Not Insurance

This Court has unambiguously stated that contractual hold harmless provisions are *not* insurance. "Indemnification and hold harmless agreements are a means of shifting the financial consequences of a loss, and are essentially **non-insurance** contractual risk transfers." *Marlin v. Wetzel County Bd. Educ.*, 212 W. Va. 215, 221, 569 S.E.2d 462, 468 (2002) (emphasis added). Notwithstanding this statement in *Marlin*, Appellant argues that the hold harmless provision of the construction contract "while not necessarily synonymous with insurance, is nevertheless the practical equivalent of 'insurance' for purposes of the analysis set forth in *Pittsburgh Elevator* . . ." *Appellant's Brief* at 16. Appellant quotes *Marlin* at length on the issue of what indemnification means, but conveniently fails to acknowledge this Court's statement that hold harmless agreements are "non-insurance contractual risk transfers." *Marlin*, 212 W. Va. at 221, 569 S.E.2d at 468.

Again, the applicable provision of the contract between the Department and NECC provides as follows: "Contractor [NECC] agrees . . . to save the Department harmless from all liability for damage to persons or property that may accrue during and by reason of the acts or negligence of the Contractor [NECC], his agents, employees, or subcontractors if there be such." This provision represents a bargained-for allocation of financial risks for potential claims arising out of NECC's actions on the project - not the Department's. If this were truly insurance for the

benefit of the Department, NECC would be required to provide indemnification for the Department's negligence, which is the traditional role of insurance. Not surprisingly, the hold harmless provision does not provide for indemnity against liability resulting from the Department's sole negligence. The Department does not have insurance coverage by virtue of the hold harmless provision. What the Department has is a contractual right to recover certain costs from NECC. As recognized in *Marlin*, this is a non-insurance contractual risk transfer. As explained more fully below, whether NECC is insured for this risk is completely irrelevant to what the hold harmless provision provides and how it affects the State's constitutional immunity.

The hold harmless agreement is not insurance for another reason - neither the Department or NECC are in the "business of insurance" as contemplated by the Legislature. "Insurer is every person engaged in the business of making contracts of insurance." West Virginia Code § 33-1-2; *see also Hawkins v. Ford Motor Co.* 211 W.Va. 487, 491, 566 S.E.2d 624, 628 (2002) (self-insured company not in the "business of insurance). Taking Appellant's argument to its logical conclusion, if a hold harmless provision constitutes insurance, then NECC and any other party that includes a hold harmless provision in a contract must be licensed by the West Virginia Insurance Commission to include such a term in a contract. The absurdity of such a result is obvious.

In light of *Marlin* and the practical realities of accepting Appellant's argument, hold harmless provisions simply are not insurance and Judge Berger was correct in reaching this conclusion.

2. Only the Legislature Has the Power to Abrogate the State's Sovereign Immunity and Create Jurisdiction in the Circuit Courts

Even if a contractual hold harmless provision were considered insurance, it is not the type of insurance that abrogates the State's immunity under *Pittsburgh Elevator*. Syllabus Point 2 of

that case states as follows: "[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of **the State's liability insurance coverage**, fall outside the traditional constitutional bar to suits against the State." *Pittsburgh Elevator*, 172 W. Va. 743, 310 S.E.2d 675 (emphasis added). The Court's phrase "the State's liability insurance coverage" references the insurance policy procured by the State, as authorized by West Virginia Code § 29-12-5, to provide liability insurance coverage for claims that fall within the scope of that coverage. *Pittsburgh Elevator* did not abrogate the State's immunity to the extent that a State agency may enter into a contract that contains an indemnification provision in its favor. *Pittsburgh Elevator* only abrogates the State's immunity to the extent insurance coverage is available under the policy authorized by the Legislature and crafted by BRIM. Other agencies of the Executive Branch, such as the Department, simply do not have the power to unilaterally modify the coverage, as determined by BRIM, by entering into contracts with third parties.

In light of the above, Judge Berger properly ruled that the contractual hold harmless provision does not qualify as "the State's liability coverage" under *Pittsburgh Elevator*. This same reasoning defeats Appellant's argument that the existence of coverage in favor of NECC under its Liberty Mutual policy for costs covered by the hold harmless agreement somehow abrogates constitutional sovereign immunity. Whether such coverage exists is completely irrelevant to the question of sovereign immunity. Again, *Pittsburgh Elevator* only abrogated the State's immunity, and vested the circuit courts with subject matter jurisdiction over the State, to the extent the insurance policy authorized by West Virginia Code § 29-12-5 provides coverage for claims against the State. The Liberty Mutual policy is not authorized by West Virginia Code § 29-12-5 - it was acquired by, and provides coverage for, a third party. Private parties do not have the raw power to abrogate the State's constitutional immunity. But in order to accept

Appellant's argument, this Court would have to so conclude. Furthermore, unlike the policy authorized by the Legislature, BRIM has no control over the scope or amount of coverage provided by this policy, which is a key component of the State's liability under *Pittsburgh Elevator*.

Plaintiff's essential position is that not only may State agencies, by contract, unilaterally modify the scope of insurance coverage and sovereign immunity established by BRIM, but private parties may do so as well by the simple act of acquiring a private insurance policy that provides coverage for costs covered by a hold harmless agreement. With this power, State agencies and private parties may vest the circuit courts with subject matter jurisdiction over the State where none may have before existed under West Virginia law. Such an argument stretches the holding of *Pittsburgh Elevator* beyond parody.

Under Appellant's theory, the State would lose all control of the scope and amount of the insurance coverage that determines the extent of its immunity. Multiple insurance policies are almost always involved in any construction project. Beyond construction projects, multiple insurance policies are usually involved in any litigation where multiple defendants have been named. The existence of insurance coverage under any given policy is usually a question of law (at least where the facts are not in dispute). *Murray v. State Farm Fire and Cas. Co.* 203 W. Va. 477, 482, 509 S.E.2d 1, 6 (1998). Instead of being able to determine the existence of subject matter jurisdiction by virtue of the State's policy, multiple insurance policies would have to be evaluated. The State would likely find itself mired in endless declaratory judgment actions to determine whether some private insurance policy the State had nothing to do with might provide some form of coverage that benefits the State in any given situation. This is well beyond the holding of *Pittsburgh Elevator*.

Judge Berger correctly ruled that only the insurance policy authorized by statute and crafted by BRIM determines the scope of the Department's potential liability. Neither a contractual hold harmless provision nor a third party's insurance policy can do so.

D. Judge Berger Did Not Err by Adhering to the West Virginia Constitution and Established Precedent

Appellant's last assignment of error claims that Judge Berger should have ignored the principle of sovereign immunity set forth in the West Virginia Constitution and that she should have further taken it upon herself to overrule the well-settled principles established by *Pittsburgh Elevator* and its progeny. Appellant has failed to articulate any well reasoned legal argument in support of her position that this Court should re-examine those long-standing principles. As discussed above, the contractual and insurance arrangements in place at the time of Mr. Blessing's accident provided a source of compensation to Appellant. The source of that compensation came from the parties who were responsible for the safety and health of workers on the project and whose employee's actions caused the accident. The scope of coverage provided by the State's liability insurance coverage represents a balancing of public interests that provides insurance coverage when the Department's employees and/or equipment may possibly be at fault for an injury. According to the National Union policy, this is when Department employees are present at the scene of an accident "performing construction, maintenance, repair, or cleaning" other than inspection of work being performed or materials being used by others. There is no reason for this Court to question the Legislature's wisdom in this regard.

VIII. Conclusion

This Court should affirm Judge Berger's award of summary judgment to the Department because the facts, the law, and the policy behind sovereign immunity and the holding of *Pittsburgh Elevator* all support the ruling below. Clearly, no genuine issue of fact exists that could result in insurance coverage under the State's policy and summary judgment for the Department was appropriate. A contractual hold harmless provision is not insurance in the first place, and is certainly not "the State's liability insurance coverage" within the meaning of *Pittsburgh Elevator*. Neither is a private insurance policy acquired by a third party. Only the Legislature and BRIM, not the Department or private parties, has the power to determine the scope of sovereign immunity through insurance coverage. For all these reasons, this Court should affirm Judge Berger's award of summary judgment to the Department.

Appellees, West Virginia Department of Transportation, Division of Highways and Byron Smith

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APPELLEES.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellees West Virginia Department of Transportation, Division of Highways and Byron Smith, does hereby certify that service of the foregoing **"Appellees' Brief"** has been made upon the following this 12TH day of September, 2007, via U.S. Mail addressed to the following:

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